

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 010722-00

Anthony Battaglia
Analog Devices, Inc.
Sentry Insurance Company

Employee
Employer
Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Carroll and Fabricant)

APPEARANCES

David R. Lucas, Esq., for the employee
Richard J. Florino, Esq., for the insurer at hearing
William E. Holtz, Esq., for the insurer on appeal

COSTIGAN, J. The insurer appeals from an administrative judge's decision on recommitment from the reviewing board. Our prior decision, Battaglia v. Analog Devices, 17 Mass. Workers' Comp. Rep. 462 (2003), ordered the administrative judge to correct various mistakes in his original liability decision, chief among which was his sua sponte award of unclaimed permanent and total incapacity benefits under § 34A. "The judge's action resulted in a violation of the insurer's due process rights. [Citation omitted.] The insurer had absolutely no opportunity to defend and present evidence pertinent to this 'claim.' As a result, we reverse the order of § 34A benefits." Id. at 463.

Consistent with the reviewing board's recommitment order, the judge refrained from awarding the unclaimed § 34A benefits,¹ finding that the employee was "not entitled to § 34A benefits at this time." (Dec. 11.) He did find that the employee remained totally incapacitated from work, (Dec. 8-9), and as § 34 benefits had been exhausted, he properly awarded § 35 partial incapacity benefits at the maximum rate. (Dec. 12.) See Liberman v. McLean Hosp., 17 Mass.

¹ The judge nevertheless repeated the error of identifying as part of the employee's claim, "§ 34A permanent total disability benefits from July 14, 200 [sic] to date and continuing." (Dec. 3.)

Workers' Comp. Rep. 1, 6 (2003), citing Mansfield v. Emery Worldwide Freight Corp., 15 Mass. Workers' Comp. Rep. 318, 319 (2001) and Marino v. M.B.T.A., 7 Mass. Workers' Comp. Rep. 140, 141-142 (1993).

The judge again found, however, that the employee "is permanently totally disabled." (Dec. 11.) Although relieved of the § 34A award, the insurer argues that the judge erred by again finding the employee permanently and totally disabled, because the employee had made no such claim. We agree that the judge exceeded the scope of his authority in addressing whether the employee was permanently incapacitated. "Where there is no claim and, therefore, no dispute, . . . the judge strayed from the parameters of the case and erred in making findings on [an] issue[] not properly before [him]." Medley v. E. F. Hausermann Co., 14 Mass. Workers' Comp. Rep. 327, 330 (2000), quoting Gebeyan v. Cabot's Ice Cream, 8 Mass. Workers' Comp. Rep. 101, 102-103 (1994). See also, Laverde v. Hobart Sales and Service, 18 Mass. Workers' Comp. Rep. 214, 220-221 (2004)(Costigan, J., concurring)(judge exceeded scope of authority by making findings on extent of disability in employee's claim for medical benefits only).

Accordingly, we vacate the judge's finding that the employee "is permanently totally disabled." (Dec. 11.) As the insurer has raised no other issue on appeal, we affirm the remainder of the decision in its entirety.

So ordered.

Patricia A. Costigan
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Filed: **February 16, 2006**